

PROTHONOTARY
FRANKLIN COUNTY PA

2011 NOV -8 P 1:37

LINDA L. BEARD
PROTHONOTARY

DEPUTY TO

**IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF
PENNSYLVANIA—FRANKLIN COUNTY BRANCH**

**KEITH LARGENT and JENNIFER
LARGENT,**

Plaintiffs

vs.

JESSICA REED,

Defendant

vs.

SAGRARIO PENA,

Additional Defendant

CIVIL ACTION - LAW

No. 2009-1823


JUDGE RICHARD J. WALSH

OPINION AND ORDER

“Facebook helps you connect and share with the people in your life.”¹ But what if the people in your life want to use your Facebook posts against you in a civil lawsuit? Whether and to what extent online social networking information is discoverable in a civil case is the issue currently before the Court.

1. <http://www.facebook.com>.

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LINDA L. BEARD, PROTHONOTARY

Defendant Jessica Rosko² has filed a *Motion to Compel Plaintiff Jennifer Largent's Facebook Login Information*. Rosko has a good faith belief that information on Jessica Largent's Facebook profile is relevant to Rosko's defense in this matter. For the following reasons, the Court holds that the information sought is discoverable, and we will grant the motion to compel.

Background

I. Underlying Facts

This case arises out of a chain-reaction auto accident that occurred four years ago. According to the pleadings, Plaintiff Keith Largent was driving a 1986 Honda Shadow Motorcycle on Lincoln Way East in Chambersburg, with Plaintiff Jessica Largent as a passenger. Compl. ¶¶ 4, 19. At an intersection, Rosko collided with a minivan driven by Additional Defendant Sagrario Pena, pushing the van into Plaintiffs' motorcycle. *Id.* ¶¶ 6-7. As a result of the crash, Plaintiffs allege serious and permanent physical and mental injuries, pain, and suffering. *Id.* ¶¶ 11-14, 17, 21-24, 27.

On April 27, 2009, Plaintiffs filed their four-count Complaint against Rosko. Plaintiffs allege two counts each of negligence and loss of consortium. On July 20, Rosko filed an Answer with New Matter, to which Plaintiffs filed a Reply on August 11. The pleadings joining Pena as an additional defendant are not relevant here, and he is not a party to the instant motion.

During the deposition of Jennifer Largent, taken May 18, 2011, Defense counsel discovered that she has a Facebook profile, that she had used it regularly to play a game called FrontierVille, and that she last accessed it the night before the deposition. Def.'s Mot. to Compel, Ex. A, Dep. of Jennifer Elaine Largent, 90-91, 94. Rosko refused, however, to disclose any

2. Ms. Rosko was formerly known as Jessica Reed. Def.'s Answer with New Matter ¶ 3. The Court will refer to her by her current name.

information about the account, and Plaintiffs' counsel advised that it would not voluntarily turn over such information. Id. This motion to compel followed on August 1, 2011.

II. Facebook

Facebook is a free social networking site. To join, a user must set up a profile, which is accessible only through the user's ID (her email) and a password. Facebook allows users to interact with, instant message, email, and friend or unfriend other users; to play online games; and to upload notes, photos, and videos. Facebook users can post status updates about what they are doing or thinking. Users can post their current location to other friends, suggest restaurants, businesses, or politicians or political causes to "like," and comment or "like" other friends' posts.³

Social networking websites like Facebook, Google+, and MySpace are ubiquitous. Facebook, which is only seven years old, has more than 800 million active users, 50% of whom are active on the site at any given day.⁴ Facebook has spawned a field of academic research, books, and a movie. Social networking websites also have a dark side—they have caused criminal investigations and prosecutions and civil tort actions. See, e.g., Chapman v. Unemp't Comp. Bd. of Review, 20 A.3d 603 (Pa. Cmwlth. 2011) (employee fired for posting on Facebook while at work); United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (woman criminally prosecuted for breaching MySpace's terms of use); In re Rolando S., 129 Cal. Rptr. 3d 49 (Ct. App. 2011) (prosecution of a juvenile who hacked another child's Facebook account and posted

3. Facebook currently does not allow a person to "dislike" (or in Facebook parlance, "un-like") a friend's post, probably for good reason.

4. Facebook Statistics <http://www.facebook.com/press/info.php?statistics> (last visited Oct. 25, 2011).

vulgar material therein); Finkel v. Dauber, 906 N.Y.S.2d 697 (Sup. Ct. Nassau 2010) (lawsuit concerning allegedly defamatory material posted in a Facebook group).

Facebook has a detailed, ever-changing privacy policy. Only people with a user account can access Facebook. For all practical purposes, anyone with an email account can set up a Facebook account.⁵ Users can set their privacy settings to various levels, although a person's name, profile picture, and user ID are always publically available. At the least restrictive setting, named "public," all 800 million users can view whatever is on a certain user's profile.⁶ At an intermediate level, only a user's Facebook friends can view such information, and at the least restrictive, only the user can view his or her profile. Facebook also currently allows users to customize their privacy settings.

Facebook alerts users that Facebook friends may "tag" them in any posting, such as a photograph, a note, a video, or a status update. A tag is a link to a user's profile:

If someone clicks on the link, they will see your public information and anything else you let them see.

Anyone can tag you in anything. Once you are tagged in a post, you and your friends will be able to see it. For example, your friends may be able to see the post in their News Feed or when they search for you. It may also appear on your profile.

You can choose whether a post you've been tagged in appears on your profile. You can either approve each post individually or approve all posts by your friends. If you approve a post and later change your mind, you can always remove it from your profile.

5. To comply with federal law, one must be 13 or older to have a Facebook account. This policy is apparently hard to enforce and is openly flouted.

6. Facebook Data Use Policy—Sharing and finding you on Facebook, <http://www.facebook.com/about/privacy/your-info-on-fb#controlprofile> (last visited Oct. 27, 2011).

If you do not want someone to tag you in their posts, we encourage you to reach out to them and give them that feedback. If that does not work, you can block them. This will prevent them from tagging you going forward.

If you are tagged in a private space (such as a message or a group) only the people who can see the private space can see the tag. Similarly, if you are tagged in a comment, only the people who can see the comment can see the tag.⁷

Therefore, users of Facebook know that their information may be shared by default, and a user must take affirmative steps to prevent the sharing of such information.

Facebook also alerts users that it may reveal information pursuant to legal requests:

Responding to legal requests and preventing harm

We may share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards. We may also share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity; to protect ourselves and you from violations of our Statement of Rights and Responsibilities; and to prevent death or imminent bodily harm.⁸

Discussion

Rosko has moved to compel Jennifer Largent to disclose her Facebook username and password. She claims that, as of January 2011, Largent's Facebook profile was public, meaning that anyone with an account could read or view her profile, posts, and photographs. Rosko says that certain posts on Largent's Facebook account contradict her claims of serious and severe

7. Facebook Data Use Policy—Sharing and finding you on Facebook, <http://www.facebook.com/about/privacy/your-info-on-fb#friendsshare>.

8. Facebook Data Use Policy—Some things you need to know, <http://www.facebook.com/about/privacy/other> (internal hyperlinks removed).

injury. Specifically, Rosko claims that Largent had posted several photographs that show her enjoying life with her family and a status update about going to the gym.

Jennifer Largent responds that the information sought is irrelevant and does not meet the prima facie threshold under Pennsylvania Rule of Civil Procedure 4003.1. She further argues that disclosure of her Facebook account access information would cause unreasonable embarrassment and annoyance. Finally, she claims that disclosure may violate privacy laws such as the Stored Communications Act of 1986, Pub. L. No. 99-508, tit. II, § 201, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2701-12).

I. Discovery Standard

In Pennsylvania,

a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Pa. R.C.P. 4003.1(a). It is no objection that the material sought will be inadmissible at trial, so long as the material “appears reasonably calculated to lead to the discovery of admissible evidence.” Pa. R.C.P. 4003.1(b). Therefore, the material Rosko seeks must be relevant and not privileged.

The Pennsylvania discovery rules are broad, and the relevancy threshold is slight. E.g., George v. Schirra, 814 A.2d 202, 204 (Pa. Super. 2002). Relevancy is not limited to the issues raised in the pleadings, and it carries a broader meaning than the admissibility standard at trial. Id. at 205; 9 Goodrich Amram 2d § 4003.1(a):(6).

There are no Pennsylvania appellate opinions addressing whether material contained on social networking websites is discoverable in a civil case. This is most likely because social networking is a recent phenomenon and issues are just beginning to percolate in the courts. See Evan E. North, Comment, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. Kan. L. Rev. 1279, 1308 (2010) (noting social networking websites' effect on discovery).

Because of the lack of binding authority, the Parties have cited trial courts in this State and others. Rosko cites two cases in which the court permitted discovery of material on social network websites. Zimmerman v. Weis Mkts., Inc., No. CV-09-1535, 2011 WL 2065410 (Pa. C.P. Northumberland May 19, 2011); McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD, 2010 WL 4403285 (Pa. C.P. Jefferson Sept. 9, 2010). In response, Plaintiffs cite two cases where courts have denied discovery of Facebook material. Piccolo v. Paterson, No. 2009-4979 (Pa. C.P. Bucks May 6, 2011); Kennedy v. Norfolk S. Corp., No. 100201437 (Pa. C.P. Phila. Jan 15, 2011).⁹

Courts in other jurisdictions have also allowed discovery of social networking data in civil lawsuits. See, e.g., Offenback v. LM Bowman, Inc., No. 1:10-CV-1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011); EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430 (S.D. Ind. 2010); Romano v. Steelcase, Inc., 907 N.Y.S.2d 650 (Sup. Ct. Suffolk 2011).

In Offenback, a personal injury case, the court ordered the plaintiff to turn over data contained on his Facebook page in a form mutually agreeable to the parties. Offenback, 2011

9. Counsel's citation of these cases (via an online *Pittsburgh Post-Gazette* article and an article written by an attorney from a law firm specializing in plaintiffs' personal injury representation) is inadequate. Counsel is reminded that the proper way to cite an unreported case is, at minimum, to provide a docket number so that the Court does not need to conduct a wild goose chase to find the case.

WL 2491371, at *2-3. Specifically, the court ordered Offenback to turn over information that contradicted his claim of injury. *Id.* In Simply Storage, a Title VII sexual harassment case, the court allowed discovery of Facebook material including status updates, communications between two plaintiffs who alleged emotional distress injuries, and photographs and videos. Simply Storage, 240 F.R.D. at 436. In Romano, a personal injury action, the court ordered access to all the plaintiffs' social networking website information. Romano, 907 N.Y.S.2d at 657.

As far as the threshold relevancy inquiry is concerned, it is clear that material on social networking websites is discoverable in a civil case. Pennsylvania's discovery rules are broad, and there is no prohibition against electronic discovery of relevant information. Furthermore, courts in other jurisdiction with similar rules have allowed discovery of social networking data.

Rosko claims a good faith basis for seeking material contained on Jennifer Largent's Facebook account. Largent has pleaded that she suffers from, among other things, chronic physical and mental pain. Compl. ¶ 21. At her deposition, Largent testified that she suffers from depression and spasms in her legs, and uses a cane to walk. Def.'s Mot. to Compel, Ex. A 65, 85. Rosko claims that Largent's formerly public Facebook account included status updates about exercising at a gym and photographs depicting her with her family that undermine her claim for damages. The information sought by Rosko is clearly relevant. The information sought by Rosko might prove that Largent's injuries do not exist, or that they are exaggerated. Therefore, Rosko satisfies the relevancy requirement.

II. Privilege and Privacy Concerns

Having determined that Rosko satisfies the threshold relevancy requirement, the Court must determine whether privilege or privacy rights protect against discovery. Privileged matter is

not discoverable. Pa R.C.P. 4011(c); 4003.1(a). The term “privilege” refers only to those recognized by the common law, statutory law, or the Constitution. S.M. ex rel. R.M. v. Children & Youth Servs. of Del. Cnty., 686 A.2d 872, 874-75 (Pa. Cmwlth. 1996). If either Pennsylvania’s law of privilege or statutory law, such as the Stored Communications Act, prohibits disclosure, the relevant information Rosko seeks is not discoverable.

A. Privilege Under Pennsylvania Law

Pennsylvania disfavors privileges, and the law recognizes only a limited number of privileges. Joe v. Prison Health Servs., Inc., 782 A.2d 24, 30-31 (Pa. Cmwlth. 2001).

There is no confidential social networking privilege under existing Pennsylvania law. McMillan 2010 WL 4403285. There is no reasonable expectation of privacy in material posted on Facebook. Almost all information on Facebook is shared with third parties, and there is no reasonable privacy expectation in such information.¹⁰ Cf. Commonwealth v. Proetto, 771 A.2d 823, 828 (Pa. Super. 2001).

When a user communicates on Facebook, her posts may be shared with strangers. McMillan, 2010 WL 4403285. And making a Facebook page “private” does not shield it from discovery. Simply Storage Mgmt., 270 F.R.D. at 434; Patterson v. Turner Constr. Co., --- N.Y.S.2d ---, 2011 N.Y. Slip Op. 07572, 2011 WL 5083155 (App. Div. Oct. 27, 2011). This is so because, as explained above, even “private” Facebook posts are shared with others.

The Court holds that no general privacy privilege protects Jennifer Largent’s Facebook material from discovery. No court has recognized such privilege, and neither will we. By

10. There may be a reasonable expectation of privacy in undelivered Facebook email messages. That expectation of privacy vanishes once the email reaches the intended recipient. Commonwealth v. Proetto, 771 A.2d 823, 828 (Pa. Super. 2001); accord United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004). (“[Computer users have no reasonable] expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient.”).

definition, there can be little privacy on a *social* networking website. Facebook's foremost purpose is to "help you connect and share with the people in your life." That can only be accomplished by sharing information with others. Only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets.

B. The Stored Communications Act

The Court next must determine whether the Stored Communications Act (SCA or Act) prohibits disclosure of Jennifer Largent's Facebook information.¹¹ The SCA is part of the Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986). The SCA fills the gaps left by the Fourth Amendment, which weakly protects the digital and electronic worlds. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislature's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1212-13 (2004). The SCA does this by creating limits on the government's ability to compel Internet Service Providers (ISPs) to disclose information about their users, and it places limits on ISPs' ability to voluntarily disclose information about their customers and subscribers to the government. See 18 U.S.C. §§ 2702-03.

Crucial to the resolution of this motion, the SCA regulates only ISPs or other types of network supporters. It divides ISPs into two categories: electronic communications services (ECSs) and remote computing services (RCSs). An ECS is "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). An RCS stores data long-term for processing or storage. Id. § 2711(2). The terms are somewhat confusing because they reflect the state of computing technology as it existed in 1986 (a time before smartphones, Facebook, and the World Wide Web). Kerr, 72 Geo. Wash. L. Rev. at 1213.

11. Largent argues that disclosure of her Facebook information "may violate privacy laws." Pls.' Answer to Def.'s Mot. to Compel ¶ 21. As she cites only the SCA, it is the only authority that the Court addresses.

To simplify greatly, RCSs store information for longer periods of time than ECSs.¹² The SCA applies differently to each but, as will be apparent below, the minutiae are irrelevant for our purposes.

Only one court has addressed whether Facebook is an entity covered by the SCA. See Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010). In Crispin, the defendants served subpoenas upon Facebook and other social networking sites seeking information about the plaintiff's online postings. Id. at 969. The plaintiff filed a motion to quash the subpoenas arguing, among other things, that the SCA prohibited disclosure. Id. In a comprehensive opinion, the court held that Facebook is both an ECS and an RCS, depending on which function of the site is at issue. Id. at 987-88, 990.

The court granted the motion to quash. In doing so, it held that civil subpoenas are never permissible under the SCA. Id. at 975-76 (quoting Viacom Int'l, Inc. v. YouTube, Inc., 253 F.R.D. 256, 264 (S.D.N.Y. 2008); In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 611 (E.D. Va. 2008); O'Grady v. Super. Ct., 139 Cal. App. 4th 1423 (2006)).

Crispin is distinguishable. In that case, the defendants sought information via subpoena to Facebook and other social networking sites. In this case, Rosko seeks the information directly from Jennifer Largent. The SCA does not apply because Largent is not an entity regulated by the SCA. She is neither an RCS nor an ECS, and accessing Facebook or the Internet via a home computer, smartphone, laptop, or other means does not render her an RCS or ECS. See Kerr, 72 Geo. Wash. L. Rev. at 1214. She cannot claim the protection of the SCA, because that Act does not apply to her. "The SCA is not a catch-all statute designed to protect the privacy of stored

12. For a much more comprehensive explanation of the SCA, see the law review article cited herein and Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 971-73 (C.D. Cal. 2010).

Internet communications.” Id. Rather, it only applies to the enumerated entities. Largent being neither an ECS nor an RCS, the SCA does not protect her Facebook profile from discovery.

III. Breadth of Discovery Request

Finally, having determined that the information sought by Rosko is relevant and not privileged, the Court must consider whether her request is overbroad. No discovery is permitted if it is not relevant to the pending action or if it would cause unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa. R.C.P. 4011. The mere existence of some annoyance or embarrassment is insufficient to bar discovery. 9A Goodrich Amram 2d § 4011(b):1. Unreasonableness is determined on a case-by-case basis.

As we noted above, Largent has no privacy rights in her Facebook postings, and there is no general Facebook social networking privilege. Furthermore, she cannot claim the protections of the Stored Communications Act.

We further note that, in filing a lawsuit seeking monetary damages, Largent has placed her health at issue, which vitiates certain privacy interests. Any posts on Facebook that concern Largent’s health, mental or physical, are discoverable, and any privilege concerning such information is waived. Gormley v. Edgar, 995 A.2d 1197, 1206 (Pa. Super. 2010); Kraus v. Taylor, 710 A.2d 1142 (Pa. Super. 1998), alloc. granted, 727 A.2d 1109 (Pa. 1999), and alloc. dismissed, 743 A.2d 451 (Pa. 2000).

Largent complains that Rosko’s motion is akin to asking her to turn over all of her private photo albums and requesting to view her personal mail. Pls.’ Answer to Def.’s Mot. to Compel ¶ 23. But those analogies are mistaken in their characterization of material on Facebook. Photographs posted on Facebook are not private, and Facebook postings are not the same as

personal mail. Largent points to nothing specific that leads the Court to believe that discovery would cause unreasonable embarrassment. Bald assertions of embarrassment are insufficient. As the court stated in McMillan, Facebook posts are not truly private and there is little harm in disclosing that information in discovery.¹³

Nor does the Court believe that allowing Rosko access to Largent's Facebook profile will cause unreasonable annoyance. The court notes that the entire cost of investigating Largent's Facebook information will be borne by Rosko. Also, Largent can still access her account while Rosko is investigating. As Rosko argues, this is one of the least burdensome ways to conduct discovery.

Finally, the Court finds it significant that the only two Pennsylvania trial courts (of which we are aware) have granted discovery in identical situations. Zimmerman, 2011 WL 2065410; McMillen 2010 WL 4403285. The cases cited by Largent, though to the contrary, lack any persuasive authority because those orders are unsupported by any written opinion or memorandum.

We agree with Rosko that information contained on Jennifer Largent's Facebook profile is discoverable. It is relevant and not covered by any privilege, and the request is not unreasonable. We will thus allow Rosko access to Largent's Facebook account to look for the necessary information. Plaintiff Jessica Largent must turn over her Facebook login information to Defense counsel within 14 days of the date of the attached Order. Defense counsel is allotted a

13. The Court does not hold that discovery of a party's social networking information is available as a matter of course. Rather, there must be a good faith basis that discovery will lead to relevant information. Here, that has occurred because Jennifer Largent's profile was formerly public. In other cases, it might be advisable to submit interrogatories and requests for production of documents to find out if any relevant information exists on a person's online social networking profiles.

21-day window in which to inspect Largent's profile. After the window closes, Plaintiff may change her password to prevent any further access to her account by Defense counsel.

An Order follows.

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF
PENNSYLVANIA—FRANKLIN COUNTY BRANCH

KEITH LARGENT and JENNIFER
LARGENT,

Plaintiffs

vs.

JESSICA REED,

Defendant

vs.

SAGRARIO PENA,

Additional Defendant

CIVIL ACTION - LAW

No. 2009-1823

JUDGE RICHARD J. WALSH

DEPUTY
LINDA L. BEARD
PROTHONOTARY

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FRANKLIN COUNTY PA

ORDER OF COURT

November 7, 2011, the Court having reviewed Defendant Jessica Rosko' *Motion to Compel Plaintiff Jennifer Largent's Facebook Login Information*, Plaintiffs' *Answer* thereto, the briefs, the record, and the law,

IT IS HEREBY ORDERED that Defendant's Motion to Compel be, and hereby is, **GRANTED**.

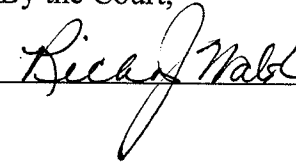
IT IS FURTHER ORDERED that Plaintiff Jennifer Largent shall turn over to Defense counsel her Facebook username email and password within 14 days of the date of this Order. Plaintiff shall not delete or otherwise erase any information on her Facebook account. After 35 days from the date of this Order, Plaintiff may change her Facebook login password to prevent further access by Defense counsel.

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LINDA L. BEARD, PROTHONOTARY

Pursuant to the requirements of Pa. R.C.P. 236 (a)(2), (b), (d), the Prothonotary shall immediately give written notice of the entry of this Order, including a copy of this Order, to each party's attorney of record, or if unrepresented, to each party; and shall note in the docket the giving of such notice and the time and manner thereof.

By the Court,


_____ J.

The Prothonotary shall give notice to:

Christopher T. Moyer, Esq., Counsel for Plaintiffs

Donald L. Carmelite, Esq., Counsel for Defendant

Stephen J. Magley, Esq., Counsel for Additional Defendant